Supreme Court, U.S.
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No. ——

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

WILLIAM HARDING, *et al.*,
Petitioners,

v.

GARNETT WARD
AND THE COMMONWEALTH OF KENTUCKY,
Respondents.

Petition for a Writ of Certiorari to the Supreme Court of Kentucky

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the decision of the Kentucky Supreme Court, which *sua sponte* overruled long-established precedent clearly defining individual property rights by holding that those rights simply no longer exist, constitutes a taking of property, in violation of the Takings Clause of the Fifth Amendment and the Due Process Clause of the Fourteenth Amendment to the Constitution.

PARTIES TO THE PROCEEDINGS

In addition to the parties in the caption, the following are petitioners: Freda Harding, Helen Bishop, Chase M. Harding, Edwin M. Harding, Nell Harding, Mary Benson, Thomas F. Benson and Lash Coal Company, Inc. Respondents are Eugene Ward and the Commonwealth of Kentucky.

DISCLOSURE STATEMENT PURSUANT TO RULE 29.1

The Lash Coal Company, Inc. has no parents and no subsidiaries.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners William W. Harding, Freda Harding, Helen Bishop, Chase M. Harding, Edwin M. Harding, Nell Harding, Mary Benson, Thomas F. Benson and the Lash Coal Company, Inc. hereby petition for a writ of certiorari to review the judgment and opinion of the Supreme Court of Kentucky in this case.

OPINIONS BELOW

The opinion of the Supreme Court of Kentucky (App. 1a-32a) is reported at 860 S.W.2d 280. The order of the Supreme Court of Kentucky denying the petition for rehearing (App. 44a) is not reported. The September 30, 1988 opinion of the Kentucky Court of Appeals (App. 33a-35a) affirming in part and reversing in part the trial court is not reported. The September 18, 1984 opinion

(App. 38a-43a) and the January 7, 1985 amended opinion (App. 36a-37a) of the trial court are not reported.

JURISDICTION

The Supreme Court of Kentucky rendered its judgment on July 15, 1993. A petition for rehearing was denied on September 30, 1993. This Court has jurisdiction pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides, in pertinent part, "nor shall private property be taken for public use, without just compensation."

The Fourteenth Amendment to the Constitution of the United States provides, in pertinent part, "nor shall any State deprive any person of life, liberty, or property, without due process of law."

STATEMENT

Petitioners (hereinafter "the Hardings") are owners or lessees of coal and mineral rights on 350 acres of land in Johnson County, Kentucky, under what is called a "broad form deed" executed in favor of their predecessors in interest in 1910. Respondent Ward owns the surface rights to a portion of that land. The deed is typical of broad form deeds in that it conveyed to the grantees, in addition to coal and mineral rights, the right to use the surface land in any manner that the grantee "deemed necessary or convenient in the free exercise and enjoyment of said property, rights and privileges hereby granted or conveyed." App. 45a.

1. In December 1982, the Hardings sued Ward and his wife [1] in the Circuit Court of Johnson County, Ken-

[1] The wife, Garnett Ward, is deceased and was not a party to the litigation at the time of the decision of the Supreme Court of Kentucky.

tucky, to quiet title and enjoin the Wards from interfering with the Hardings' right to surface mine the property.[2] App. 38a. The Wards counterclaimed for injunctive relief against this use of their property. *Id.* at 38a-39a. The trial court held that petitioners, in fact, did own the coal and mineral rights to the land, but that the deed in question was not a broad form deed and therefore did not convey the right to extract coal by surface mining methods. *Id.* at 41a.

2. Both sides appealed the trial court's judgment to the Kentucky Court of Appeals, the Hardings on the ground that the court erroneously held that the 1910 deed did not convey the right to surface mine, and the Wards on the ground that the court erred in declaring that the Hardings owned the coal beneath the Ward's land. *Id.* at 33a-34a. On September 30, 1988, the court of appeals affirmed the trial court's holding that the Hardings owned the coal rights to the Wards' land, but reversed the judgment that the 1910 deed was not a broad form deed and therefore did not grant the mineral owner the right to surface mine. *Id.* at 34a-35a.

In reaching the latter conclusion, the court of appeals expressly relied on *Akers* v. *Baldwin*, 736 S.W.2d 294 (Ky. 1987), the most recent of a long line of Kentucky cases construing broad form deeds. App. 35a. In *Akers*, the state supreme court reviewed the entire line of cases and concluded that under the decision of *Buchanan* v. *Watson*, 290 S.W.2d 40 (Ky. 1956), "the owners of min-

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[2] "Surface mining" refers to a method of mining in which the surface of the earth is removed to facilitate the removal of the minerals lying thereunder. This process is commonly referred to as "strip mining." *See Akers* v. *Baldwin*, 736 S.W.2d 294, 296 n.3 (Ky. 1987). All aspects of surface mining are regulated by the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1201 *et seq.*, and Ky. Rev. Stat. Ann. § 350.010 *et seq.* (Michie 1993), including obligating those engaged in surface mining to restore affected land to a condition capable of supporting the uses which it was capable of supporting prior to any mining. These environmental concerns are not at issue here.

eral rights under a typical broad form deed have the virtually absolute right to mine the minerals by any means, past, present or future," without the consent of the surface owner. 736 S.W.2d at 302.[3] Moreover, the *Akers* court reaffirmed the construction of broad form deeds arising out of the *Buchanan* line of cases, which held that under the plain language of the deed the owners of the mineral rights may use the surface to remove the minerals. *Id.* at 305. The court rejected the argument pressed by the surface owners that the deeds did not convey the right to surface mine because that mining technique was not contemplated at the time the deed was executed:

> The provisions in typical broad form deeds are, *beyond cavil*, clear and unambiguous. They are, in fact, *overwhelming* in their language to demonstrate an intent to convey away the rights to the minerals described. The right to the minerals carries with it the right to mine them. That a certain method of

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[3] In the years following *Buchanan*, the Kentucky Supreme Court unfailingly adhered to this holding and even expanded the rights of mineral owners under broad form deeds. *See, e.g., Bevander Coal Co.* v. *Matney*, 320 S.W.2d 301 (Ky. 1959) (*Buchanan* was dispositive of suit by surface owner against mineral owner; damages limited to actions by miner that were oppressive, arbitrary, wanton, or malicious); *Blue Diamond Coal Co.* v. *Neace*, 337 S.W.2d 725 (Ky. 1960) (mere exercise of right to surface mine cannot of itself be arbitrary, wanton, or malicious); *Kodak Coal Co.* v. *Smith*, 338 S.W.2d 699 (Ky. 1960) (upholding surface mining under a broad form deed despite trial court's finding that the coal could be mined by other methods); *Blue Diamond Coal Co.* v. *Campbell*, 371 S.W.2d 483 (Ky. 1963); *Martin* v. *Kentucky Oak Mining Co.*, 429 S.W.2d 395, 399 (Ky. 1968) (refusing to reconsider *Buchanan*; landowners' arguments cannot prevail against "the long entrenched rule of our previous cases in reliance upon which property rights have vested"); *Commerce Union Bank* v. *Kinkade*, 540 S.W.2d 861, 864 (Ky. 1976) (broad form deeds grant "such overwhelming mining rights that the mineral owner in fact has the right to use the surface of the land, part or all of it, in recovering the coal acquired by the deeds"), *cert. denied*, 430 U.S. 915 (1977); *Akers* v. *Baldwin*, 736 S.W.2d 294, 300-04 (Ky. 1987) (discussing *Buchanan* and progeny).

> mining was known at the time the document was executed is simply not relevant.

Id. at 304-05.[4]

3. The Wards sought review in the Supreme Court of Kentucky. In November 1988, while the Wards' motion for discretionary review was pending, the people of Kentucky ratified an amendment to the Constitution of Kentucky (hereinafter "the broad form deed amendment") which essentially required the construction of any deed purporting to sever surface and mineral rights to preclude the mining of coal by any method not in use in the affected area at the time the deed was executed.[5] The

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[4] The *Akers* court also reviewed that part of the *Buchanan* opinion upholding the waiver of damages provisions in broad form deeds. Relying on "principles of justice" and the "public interest," the court overruled that portion of *Buchanan* and other cases holding that the mineral owner can use and damage the surface without payment of damages to the surface owner. *Akers*, 736 S.W.2d at 305. Because the court recognized, however, that this holding jeopardized property rights acquired in reliance on *Buchanan*, it limited its effect by exempting all conveyances by broad form deed, and leases and mining efforts under broad form deeds, made between the effective date of the *Buchanan* decision and the date of the *Akers* decision. *Id.* at 307. Thus, if a conveyance or lease was made while *Buchanan* was in effect, "any future conveyance, lease or mining efforts pertaining to the same property shall continue to be controlled by *Buchanan*." *Id.* Although this case concerns the right to mine, which *Akers* left intact, as opposed to liability for damages, this exemption applies to the Hardings, who leased their mineral rights after, and in reliance upon, the *Buchanan* decision, and before *Akers*. *See* App. 16a.

[5] The amendment, codified as Section 19(2) of the Constitution of Kentucky, provides as follows:

> In any instrument heretofore or hereafter executed purporting to sever the surface and mineral estates or to grant a mineral estate or to grant a right to extract minerals, which fails to state or describe in express and specific terms the method of coal extraction to be employed, or where said instrument contains language subordinating the surface estate to the mineral estate, it shall be held, in the absence of clear and convincing

Hardings challenged the amendment as applied to their case as violative of the Contract Clause [6] and the Takings Clause [7] of the Constitution of the United States. App. 16a, 17a. Initially, the Hardings sought to remand the case for a determination of the constitutionality of the statute, but subsequently agreed that the Supreme Court could decide the issue if they were given the benefit of evidence which would have been introduced if the case had been remanded to the trial court. *Id.* at 9a. This evidence consisted of the affidavit of William W. Harding, the facts of which were accepted as true by the Kentucky Supreme Court for purposes of its decision. *Id.* at 9a; see also *id.* at 48a-52a (Affidavit of William W. Harding).

a. The decision below is best understood in the context of the considerable public opposition to the holdings of *Buchanan* and its progeny which subordinated surface estates to mineral estates conveyed by broad form deeds. This opposition spawned a number of initiatives to change the law governing these deeds, culminating in the broad form deed amendment to the state constitution. The first such effort was the passage by the Kentucky legislature of a statute which forbade strip mining in the absence of a signed statement of consent from the surface owner.

In reviewing a constitutional challenge to that statute, the court in *Department for Natural Resources & Environmental Protection* v. *No. 8 Ltd.*, 528 S.W.2d 684, 686 (Ky. 1975), held that the statute represented a legitimate

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evidence to the contrary, that the intention of the parties to the instrument was that the coal be extracted only by the method or methods of commercial coal extraction commonly known to be in use in Kentucky in the area affected at the time the instrument was executed, and that the mineral estate be dominant to the surface estate for the purposes of coal extraction by only the method or methods of commercial coal extraction commonly known to be in use in Kentucky in the area affected at the time the instrument was executed.

[6] U.S. Const. art. I, § 10, cl. 1.

[7] U.S. Const. amend. V.

exercise of the police power only if it were justified as an environmental measure. The court found the legislation ineffective for such purposes because it delegated to surface owners the right to negate any conceivable environmental rationale by granting their consent, for consideration, to surface mining on their land. *Id.* The "primary purpose and effect" of the statute was "to change the relative legal rights and economic bargaining positions of many private parties under their contracts rather than achieve any public purpose." *Id.* at 687. Accordingly, the court held that this "obvious retrospective diminution of rights granted by a specific form of contract" violated both the constitutions of the United States and the Commonwealtl. of Kentucky. *Id.* at 685-87.

In 1984 the Kentucky legislature tried again, with the enactment of Sections § 381.930-381.945 of Kentucky Revised Statutes ("KRS"). In language nearly identical to that of the broad form deed amendment, KRS § 381.940, provided "[r]ules of construction for mineral deeds relating to coal extraction," which required construction of severance deeds to allow mining only by those methods in use at the time the instruments were executed, in the absence of "clear and convincing evidence" that the parties intended otherwise.[8] Ky. Rev. Stat. Ann. § 381.940

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[8] KRS § 381.940 provides as follows:

> In any instrument heretofore or hereafter executed purporting to sever the surface and mineral estates or to grant a mineral estate or to grant a right to extract minerals, which fails to state or describe in express and specific terms the method of coal extraction to be employed, or where said instrument contains language subordinating the surface estate to the mineral estate, it shall be held, in the absence of clear and convincing evidence to the contrary, that the intention of the parties to the instrument was that the coal be extracted only by the method or methods of commercial coal extraction commonly known to be in use in Kentucky in the area affected at the time the instrument was executed, and that the mineral estate be dominant to the surface estate only for the purposes of coal

(Bobbs-Merrill 1972). The law was struck down in *Akers*, 736 S.W.2d 294. The *Akers* court found that the effect of the legislation with respect to broad form deeds was to prevent strip mining altogether. *Id.* at 308. This, the court held, was unconstitutional. "A statute that functions retroactively to determine the meaning of a pre-existing deed or lease is constitutionally impermissible because this impairs the obligation of a contract." *Id.* at 310.[9]

b. Against this backdrop, the Supreme Court, the composition of which had changed since the *Akers* decision, considered the Hardings' challenge to Section 19(2) of the Kentucky constitution. Before reaching the federal constitutional issues, however, the court, in a 4-3 decision, *sua sponte* overruled *Buchanan* and its progeny, holding "that the conveyance of minerals by means of a broad form deed did not include the right to strip mine." App. 14a. Although neither the Attorney General nor the private litigants had so much as questioned the continuing validity of *Buchanan*, the court nonetheless swept away nearly 40 years of precedent and property rights that developed because of those precedents.

With *Buchanan* out of the way, the court easily disposed of the constitutional issues. It found that, contrary to the holding in *Buchanan*, the original conveyance did not create a right to surface mine. App. 16a. The contract clause was not implicated, therefore, because it protects "only those rights which are embraced in the contract at the time it is entered into." *Id.* at 17a. Accord-

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extraction by the method or methods of commercial coal extraction commonly known to be in use in Kentucky in the area affected at the time the instrument was executed.

[9] The *Akers* court also found that the statute violated the Kentucky constitution by infringing the separation of powers established by the constitution, 736 S.W.2d at 309, but found it unnecessary to reach the other grounds of alleged unconstitutionality—that the statute deprived the affected owners of mineral rights of their property without due process of law and that it effected a taking of property without just compensation. *Id.* at 310.

ingly, the state court held that the Hardings acquired no greater rights than their predecessors in interest possessed. App. 16a. Moreover, the Hardings' reliance on *Buchanan* was misplaced, under the holding below, because they had no vested right in the court's decisions. App. 16a-17a.

The Hardings' claim that the broad form deed amendment ran afoul of the Takings Clause fell victim to similar reasoning. The court's decision to overrule *Buchanan* rendered Section 19(2) redundant—once the court held that broad form deeds did not convey the right to surface mine, there was no property right left to "take." Accordingly, the court held that Section 19(2) did not affect the Hardings' right to remove minerals and therefore did not violate the Fifth and Fourteenth Amendments to the United States Constitution. App. 19a.[10]

4. The Hardings petitioned for rehearing, asserting, *inter alia*, that the decision of the Kentucky Supreme Court to overrule *Buchanan sua sponte* and to give that decision retroactive effect divested them of established property rights and constituted a taking of private property for public use without just compensation, in violation of the Fifth and Fourteenth Amendments to the United States Constitution.[11] Petition for Rehearing at 9. The

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[10] Justice Leibson, joined by Chief Justice Stephens and Justice Reynolds, dissented. App. 21a-32a. Asserting that the court had "bow[ed] to the will of the majority at the sacrifice of individual rights protected in the United States Constitution" (*id.* at 32a), he concluded that "quite obviously the state action is in derogation of the Federal Constitution," a conclusion avoided by the majority only by "first reinterpret[ing] the rights held by the parties to the contract." *Id.* at 25a.

[11] The petition for rehearing also challenged the composition of the Kentucky Supreme Court at the time it rendered the decision below. Petition for Rehearing at 8-9. One of the seven elected members of the court, Justice Dan Jack Combs, resigned effective June 30, 1993. App. 54a. On July 13, 1993, Chief Justice Stephens appointed Justice Combs a "Special Justice," to fill the vacancy created by his resignation until such time as the court's decision

petition for rehearing was denied on September 30, 1993, with a notation that Chief Justice Stephens and Justice Leibson would have granted it. App. 44a.

REASONS FOR GRANTING THE PETITION

The decision of the Supreme Court of Kentucky raises a fundamental issue concerning the extent to which state courts can redefine away property rights without running afoul of the prohibition against takings embodied in the Fifth Amendment and the Fourteenth Amendment's Due Process Clause. The court's failure to recognize that judicial action can effect such a taking conflicts with decisions of this Court, decisions of the Ninth and Fifth Circuits, and several state court decisions, and exacerbates the already unsettled state of the law concerning "judicial takings." Moreover, the logic of the court's decision essentially eviscerates any protection the Takings Clause might provide by permitting through judicial fiat what the state is constitutionally prohibited from doing through legislation or by executive action. For these reasons, certiorari is appropriate to review the decision below.

1a. The current confusion regarding whether a court decision can "take" property in violation of the just compensation clause derives from two conflicting lines of cases from this Court. In *Chicago, Burlington & Quincy Railroad* v. *City of Chicago,* 166 U.S. 226, 233-35 (1897), the Court held that the Takings Clause of the Fifth Amendment applies to the states by virtue of the Due Process Clause of the Fourteenth Amendment and, moreover, that the prohibitions of the former provision apply

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in this case became final. *Id.* "Special Justice" Combs provided the decisive fourth vote in support of the majority opinion issued by the court on July 15, 1993, despite the fact that Section 110 of the Kentucky constitution confers upon the governor the sole power to appoint a justice to try a particular cause. Ky. Const. § 110(3). The Chief Justice is empowered only to appoint judges "to sit in any court *other than the Supreme Court.*" *Id.* at § 110(5)(b) (emphasis added).

to the judgments of a state court. The Court applied this latter principle in *Muhlker* v. *New York & Harlem Railroad*, 197 U.S. 544, 570 (1905) (plurality opinion), in which it held that "the power[] of the courts . . . to declare rules of property or change or modify their decisions . . . cannot be exercised to take away rights which have been acquired by contract and have come under the protection of the Constitution of the United States." [12]

These cases, however, are at odds with *Brinkerhoff-Faris Trust & Savings Company* v. *Hill*, 281 U.S. 673, 680-82 (1930), in which this Court, without referring to its prior decisions, rejected the assertion that judicial changes in the law could violate the Due Process Clause, even if parties were prejudiced by the change. "[T]he mere fact that a state court has rendered an erroneous decision on a question of state law, or has overruled principles or doctrines established by previous decisions on which a party relied, does not give rise to a claim under the Fourteenth Amendment or otherwise confer appellate jurisdiction on this Court." *Id.* at 680; see also *Great N. Ry.* v. *Sunburst Oil & Refining Co.*, 287 U.S. 358, 364-65 (1932).

Despite the tension between *City of Chicago* and *Muhlker* on the one hand, and *Brinkerhoff-Faris* and *Sunburst* on the other, the earlier decisions were not overruled, and this Court continued to review decisions involving challenges to legislative or administrative actions where state courts had ruled on state law grounds that there was no property to take. In *Demorest* v. *City Bank Farmers Trust Company*, 321 U.S. 36 (1944), for example, the Court held that even where the constitutional challenge was denied on non-federal grounds, "it is the province of this Court to inquire whether the decision of the state court rests upon a fair or substantial basis. If unsubstantial, constitutional obligations may not be thus

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[12] The Court's holding apparently rested on both the Takings and the Contract Clauses. *See Muhlker*, 197 U.S. at 569-70.

evaded." *Id.* at 42 (quoting *Broad River Power Co.* v. *South Carolina*, 281 U.S. 537, 540 (1930)).[13]

More recently, a concurring opinion by Justice Stewart in *Hughes* v. *Washington*, 389 U.S. 290, 294-98 (1967), has provided additional support for the view that *Muhlker* remains a viable takings theory. See *infra* pp. 14-15 (discussing lower court cases). *Hughes* concerned a dispute between Stella Hughes and the state of Washington as to the ownership of an accretion to Mrs. Hughes' beach front property. The Supreme Court of Washington held that state law applied and awarded the land to the state, while a majority of this Court relied on federal law to award the accretion to Mrs. Hughes. *Id.* at 291. Justice Stewart concurred, asserting that state law controlled ownership of the accretion but that the state supreme court was bound by its earlier decision holding that title to accretions under Washington law vested in the owner of the adjoining land. *Id.* at 297.

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[13] *See also Broad River*, 281 U.S. at 543 ("we cannot say that this interpretation of statutes . . . so departs from established principles as to be without substantial basis, or presents any ground for the protection, under the Constitution, of rights and immunities which the state court has found to be non-existent"); *Fox River Paper Co.* v. *Railroad Comm'n*, 274 U.S. 651, 656 (1927) (no violation of constitution because review of state decisions disclosed "no such conflict of authority or inconsistency of judicial opinion . . . as even to suggest that the court below adopted its view in order to evade the constitutional issue"); *cf. Roberts* v. *New York City*, 295 U.S. 264 (1935) (review of damages awarded by state court in condemnation proceeding).

These cases represent a review of state court judgments under the Due Process Clause of the Fourteenth Amendment, which protects against wholly arbitrary actions by state actors. *See, e.g., American Ry. Express Co.* v. *Kentucky*, 273 U.S. 269, 273 (1927) (this Court will reverse state court judgment which "amounts to mere arbitrary or capricious exercise of power," or conflicts with fundamental principles for the protection of private rights). Nothing could be more contrary to the protection afforded private rights by the Due Process Clause than the action of the Kentucky Supreme Court in this case, which wiped out established property rights without even addressing the constitutional implications of its action.

As Justice Stewart explained, the decision of the Supreme Court of Washington would be dispositive if it "conform[ed] to reasonable expectations." *Id.* at 296. In this case, however, where the state court decision "constitute[d] a sudden change in state law, unpredictable in terms of the relevant precedents, no such deference would be appropriate." *Id.* The decision of the state supreme court effected a taking of private property without just compensation because the Fourteenth Amendment forbids "confiscation by a State, no less through its courts than through its legislature." *Id.* at 298. To hold otherwise, as Justice Stewart pointed out, would allow a state "to defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all." *Id.* at 296-97.

Despite the conflict between the cases following *City of Chicago, Muhlker,* and *Hughes* and those following *Brinkerhoff-Faris,* this Court has not revisited the issue of judicial takings.[14] Consequently, "[t]he question of whether courts, as opposed to legislative bodies, can ever 'take' property in violation of the Fifth Amendment is an interesting and by no means a settled issue of law." *Corporation of the Presiding Bishop* v. *Hodel,* 830 F.2d 374, 381 (D.C. Cir. 1987), *cert. denied,* 486 U.S. 1015 (1988). The Court should grant certiorari to reconcile

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[14] The Court in the interim has expressed views consistent with those of petitioners in this case. *See Webb's Fabulous Pharmacies, Inc.* v. *Beckwith,* 449 U.S. 155, 164 (1980) (in reviewing challenge to statute, the Court observed that neither state legislature nor state court may accomplish taking by recharacterizing property at issue); *Bonelli Cattle Co.* v. *Arizona,* 414 U.S. 313, 331 (1973) (quoting *Hughes* v. *Washington,* 389 U.S. 290, 298 (1967) (Stewart, J., concurring), for proposition that 14th Amendment prohibits taking by a state, "no less through its courts than through its legislature," but finding it unnecessary to reach takings issue), *overruled on other grounds, Oregon ex rel. State Land Board* v. *Corvallis Sand & Gravel Co.,* 429 U.S. 363 (1977).

its own divergent lines of authority and to settle the issue of "judicial takings."

b. Not surprisingly in light of this Court's divergent decisions, the lower federal and state courts are badly divided on the issue presented in this petition. On the authority of *Brinkerhoff-Faris*, several lower federal courts have rejected the notion that judicial action may be a source of property rights. In *Carolina-Virginia Racing Ass'n* v. *Cahoon*, 214 F.2d 830, 832 (4th Cir. 1954), the court held that no person has a property right in a court decision. "State courts . . . may ordinarily overrule their own decisions without offending constitutional guaranties, even though parties may have acted to their prejudice on the faith of the earlier decisions." *Id.* at 832-33 (quoting *Brinkerhoff-Faris*, 281 U.S. at 681 n.8). See also *Benedict Oil Co.* v. *United States*, 582 F.2d 544, 549 (10th Cir. 1978) (quoting *Sunray Oil Co.* v. *Commissioner*, 147 F.2d 962, 963 (10th Cir.), *cert. denied*, 325 U.S. 861 (1945)); *Baumann* v. *Smrha*, 145 F. Supp. 617, 625 (D. Kan.) (departure from prior decisions of state court establishing rule of property does not violate Fourteenth Amendment), *aff'd per curiam*, 352 U.S. 863 (1956).

Inspired by *Muhlker* and Justice Stewart's concurrence in *Hughes*, both the Ninth and the Fifth Circuits have recognized that judicial decisions creating major changes in property law may constitute "takings." In so doing, these courts declined to follow the decisions to the contrary of the Fourth and Tenth Circuits. In *Robinson* v. *Ariyoshi*, 753 F.2d 1468, 1474 (9th Cir. 1985), *vacated on other grounds*, 477 U.S. 902 (1986), the Ninth Circuit held that a decision of the Supreme Court of Hawaii, which changed the state's water law, unconstitutionally divested property owners of water rights without just compensation.[15] The Fifth Circuit also "recognizes that

[15] *See also Cherry* v. *Steiner*, 716 F.2d 687, 692 (9th Cir. 1983) (it is appropriate to consider whether state court decision was a

a State Court Judgment which violates settled legal principles" may constitute a taking. *Reynolds* v. *Georgia*, 640 F.2d 702, 705 (5th Cir.), *cert. denied*, 454 U.S. 865 (1981). Several state courts have followed suit. See, *e.g.*, *Bott* v. *Commission of Natural Resources*, 327 N.W.2d 838, 852 (Mich. 1982) (noting that cases were overruled because "they worked severe injustice and constituted a judicial 'taking' without compensation"); *State* v. *Corvallis Sand & Gravel Co.*, 582 P.2d 1352, 1363 (Ore. 1978) (given state of precedents, adoption of a contrary rule "would raise serious questions about the taking of private property for public use without compensation").[16]

The decision of the Kentucky Supreme Court in this case thus squarely presents the issue that has created enormous confusion within this Court's decisions and has divided the lower courts. It cannot be seriously doubted that the law was as settled as it could possibly be that the deed held by the Hardings here provided them with the right to surface mine the coal. Indeed, the Kentucky Supreme Court had twice declared unconstitutional state legislative efforts to eliminate those property rights. *No. 8 Ltd., supra; Akers, supra* (see discussion *supra* pp. 6-8).

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radical departure from prior law, because a "state cannot validly effect a taking of property by the simple expedient of holding that the property right never existed" (citing *Hughes*, 389 U.S. at 296-97, *Demorest*, 321 U.S. at 42-43, and *City of Chicago*, 166 U.S. at 241)), *cert. denied*, 466 U.S. 931 (1984); *Sotomura* v. *County of Hawaii*, 460 F. Supp. 473, 483 (D. Haw. 1978) (decision of Hawaii Supreme Court "was so radical a departure from prior state law as to constitute a taking").

[16] Other state courts concur that a judicial change in state law may constitute a taking, but have concluded that the cases at issue did not result in an "unpredictable change" in the law. *See County of Los Angeles* v. *Berk*, 605 P.2d 381, 388-89 (Cal.), *cert. denied*, 449 U.S. 836 (1980); *In re Sanborn*, 562 P.2d 771, 777-78 (Haw. 1977); *Village of Wilsonville* v. *SCA Servs., Inc.*, 426 N.E.2d 824, 841 (Ill. 1981). *See also State ex rel. Kobayashi* v. *Zimring*, 566 P.2d 725, 756 (Haw. 1977) (Vitousek, J., dissenting); *Van Ness* v. *Borough of Deal*, 393 A.2d 571, 577-79 (N.J. 1978) (Mountain, J., dissenting).

Instead of overruling those decisions and holding that the state constitutional amendment vitiated the Hardings' contract rights—which would have violated both the Contract and the Takings Clause protections—the state supreme court by fiat simply eliminated the Hardings' property right.

The decision below clearly represents a "sudden change in state law, unpredictable in terms of the relevant precedent," [17] because none of the parties sought review of *Buchanan* or briefed the continuing validity of that case.[18] Thus, despite its protestations that it merely stated what was "at all times the proper rule," the court below effected a taking by "the simple expedient of holding that the property right never existed," [19] a result which squarely conflicts with the opinion of Justice Stewart in *Hughes*, the opinions of the Ninth Circuit in *Robinson* and *Cherry*, and the opinion of the Fifth Circuit in *Reynolds*.[20]

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[17] *Hughes* v. *Washington*, 389 U.S. 290, 296 (1967).

[18] Surely the advocacy of counsel is a touchstone of foreseeability; in this case counsel would hardly expect the court to reconsider a decision that it had reaffirmed in a long line of precedent stretching from 1956 to 1987. *See supra* note 3.

[19] *See Cherry* v. *Steiner*, 716 F.2d at 692.

[20] The notion that judicial abrogation of property rights is immune from challenge under the Takings Clause also is at odds with the assumptions underlying this Court's opinion in *Lucas* v. *South Carolina Coastal Council*, 112 S. Ct. 2886 (1992). In *Lucas*, this Court held that a determination of whether a taking has occurred depends in part on the limitations on property rights that inhere in a state's common law of nuisance and property. *Id.* at 2900. It is anomalous to hold that a property owner's reasonable expectations about the uses to which he can put his land depend on the state's common law but that those common law doctrines are subject to revocation by the state court.

Lucas identified relevant factors to the analysis, such as whether similarly situated property owners have long engaged in the particular land use, which would suggest a lack of any common law prohibition, and whether similarly situated landowners are permitted to continue the use, which would also indicate that the

2. Not only does the holding of the Kentucky Supreme Court raise a core issue under the Fifth and Fourteenth Amendments about the retroactivity of state court decisions eliminating property rights, the decision also squarely raises the question of the extent to which there is any continuing vitality to this Court's once-venerable decision in *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393 (1922).

In *Pennsylvania Coal*, this Court considered a constitutional attack on a statute that forbade the mining of anthracite coal in any manner that might cause the subsidence of certain structures on the surface. There, as here, the deed gave the mineral owner the right to remove all coal from the property, and the surface owner expressly waived all claims for damages arising from mining the coal. See *id.* at 412-13. There, as here, the effect of the legislative enactment was to force the mineral owners to forfeit the only meaningful right associated with ownership of the coal—the right to mine it. See *id.* at 414. "To make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating it or destroying it." *Id.* Noting that the surface owners expressly assumed the risk of damage to their property, the Court concluded that the statute's efforts to "giv[e] to them greater rights than they bought" constituted an unconstitutional taking of private property without just compensation. *Id.* at 416.

The reasoning of the *Pennsylvania Coal* opinion applies with equal force to this case. The Hardings own mineral rights for 350 acres of land, of which the Wards' 34-acre surface tract is a part, pursuant to a deed that allows them

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common law did not so limit the property right. *Id.* at 2901. Both factors signal a taking in this case. Under *Buchanan* and its progeny, owners of mineral rights under broad form deeds had long enjoyed the right to engage in surface mining. Moreover, the decision below only restricts surface mining where the mineral estate is severed from the surface estate. Those owning both the surface and mineral estates are permitted to continue surface mining.

to use the surface as necessary to mine the coal and that contains an express waiver of damages by the surface owner. App. 45a-47a, 50a. It is not economically feasible to mine any of the coal under the Wards' property except by surface mining, nor is it economically feasible to deep-mine most of the coal under the rest of the Hardings' property. *Id.* at 50a-51a. In order to surface mine the coal in the 350-acre tract, it is necessary to go through the Wards' property. *Id.* at 51a. The effect of the decision below is that the Hardings will be able to recover virtually none of their coal and certainly not enough to make it commercially feasible to undertake any extraction. *Id.*

There can be no serious doubt that the logic of *Pennsylvania Coal* requires reversal in this case. Without the gambit of overruling *Buchanan,* the Kentucky Supreme Court itself previously had held that "[t]he right to the minerals carries with it the right to mine them." *Akers,* 736 S.W.2d at 305. The question warrants review because this Court's subsequent decision in *Keystone Bituminous Coal Ass'n* v. *DeBenedictis,* 480 U.S. 470 (1987), appeared to restrict the sweep of the earlier *Pennsylvania Coal* opinion authored by Justice Holmes for the Court. *Keystone* involved a challenge to a statute that regulated mining by requiring that sufficient coal be kept in the ground to prevent subsidence damage to certain surface structures. In upholding the constitutionality of the statute, the Court distinguished *Pennsylvania Coal* on two grounds. First, the Court found that the statute, which applied regardless of whether the surface estate was severed from the mineral rights, was intended to serve legitimate public interests, such as protecting the environment. *Keystone,* 480 U.S. at 486. Conversely, the statute at issue in *Pennsylvania Coal,* like the broad form deed amendment at issue here, applied only where the surface estate was severed from the mineral rights, and thus "merely involve[d] a balancing of the private economic

interests of coal companies against the private interests of the surface owners." See *Keystone*, 480 U.S. at 485.[21]

Second, the Court in *Keystone* found that the record in the case did not support a finding that the statute rendered it commercially impracticable for the petitioners to engage in the business of mining their coal. *Id.* at 493, 495-96. Of course, the holding in *Pennsylvania Coal* was premised on just such a finding. See 260 U.S. at 415-16. In this case, the unrebutted affidavit of William Harding establishes that the effect of the amendment is to render it economically infeasible to mine the coal. App. 50a-51a. Accordingly, this case presents the Court with an opportunity to clarify the relationship between *Pennsylvania Coal* and *Keystone*.

3. Finally, the decision below warrants this Court's review because the action of the Kentucky Supreme Court emasculates the Takings Clause. To let this opinion stand would permit a state to evade constitutional imperatives merely by abandoning established precedent to eliminate the property right at issue. In *No. 8 Ltd.*, 528 S.W.2d at 687, a unanimous Kentucky Supreme Court held it "axiomatic" that the Kentucky legislature could not "change the relative legal rights and economic bargaining positions of many private parties" with respect to broad form deeds without running afoul of the Takings Clause. Yet the Kentucky Supreme Court in its opinion effected precisely the same radical shift in the rights of private parties that it declared unconstitutional when effected through legislation. Because the property rights are identical, the result should not differ merely because the state actor changes.

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[21] As the Court pointed out in *Keystone*, mining resulting in surface subsidence was not permissible under the statute at issue in that case even if the surface owner approved it; the state's permission also was required. 480 U.S. at 486. The broad form deed amendment contains no similar environmental protection measure.

The rule urged by petitioners is supported by decisions of this Court holding that other constitutional restrictions apply to judicial actions. In *New York Times Co.* v. *United States,* 403 U.S. 713 (1971), for example, the Court vacated a federal court injunction prohibiting publication of classified materials because the court's action restrained free expression. In thus applying First Amendment protections against judicial action, the Court was undeterred by the express language of the First Amendment, which provides that "*Congress* shall make no law . . . abridging the freedom of speech, or of the press." U.S. Const. amend. I (emphasis added). Similarly, Article I, Section 10 of the constitution mandates that "[n]o State shall . . . pass any . . . ex post facto Law." U.S. Const. art. I, § 10, cl. 1. In *Bouie* v. *City of Columbia,* 378 U.S. 347, 353-54 (1964), the Court recognized that "an unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an *ex post facto* law," and therefore concluded that "[i]f a state legislature is barred by the *Ex Post Facto* Clause from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction." *Cf. Shelley* v. *Kraemer,* 334 U.S. 1, 14-18 (1948) (prohibitions of Fourteenth Amendment extend to all state action, whether legislative, executive, or judicial).[22]

This Court should grant certiorari to vindicate the protection of private property rights embodied in the Takings and Due Process Clauses by clarifying that judicial changes to the law that achieve "precisely the same result" as constitutionally invalid legislation do not themselves pass constitutional muster. Judicial actions which validate takings by the legislative or executive by overruling established precedent in order to eliminate retroactively

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[22] *See also* Barton H. Thompson, Jr., *Judicial Takings,* 76 Va. L. Rev. 1449, 1456-58 (1990) (reviewing cases in which the Court has applied constitutional restrictions to the judiciary).

the property right at issue are similarly infirm constitutionally.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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